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DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket Number: 120531129-2129-01]

Alternative Personnel Management System (APMS) at the National Institute of Standards and Technology

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of Modifications with Request for Comment.

SUMMARY: This notice changes the National Institute of Standards and Technology's (NIST) Alternative Personnel Management System (APMS) published October 21, 1997 (62 FR 54604, 54606), May 6, 2005 (70 FR 23996), July 15, 2008 (73 FR 40500), and July 21, 2009 (74 FR 35841 and 74 FR 35843) to (1) eliminate the required bonus for employees at the cap of their pay band who are appraised at the top two rating levels, and (2) solidify the three-year probationary period, a hallmark of the original NIST demonstration project and later APMS.

DATES: This notice is effective on [\[insert date of publication in the Federal Register\]](#).

Comments will be accepted until 5:00 PM Eastern Time on [\[insert date 30 days after publication in the Federal Register\]](#).

ADDRESSES: Send or deliver comments to Amy K. Cubert, Supervisory Human Resources Specialist, National Institute of Standards and Technology, Building 101, Room A-123, 100 Bureau Drive Mail Stop 1720, Gaithersburg, MD 20899-1720, FAX: (301) 948-6107 or email comments to ppschanges@nist.gov.

FOR FURTHER INFORMATION CONTACT: For questions or comments, please contact Amy K. Cubert at the National Institute of Standards and Technology, (301) 975-3006.

SUPPLEMENTARY INFORMATION:

Background

In accordance with Public Law 99-574, the National Bureau of Standards Authorization Act for fiscal year 1987, the Office of Personnel Management (OPM) approved a demonstration project plan, “Alternative Personnel Management System (APMS) at the National Institute of Standards and Technology (NIST),” and published the plan in the Federal Register on October 2, 1987 (52 FR 37082). The published demonstration project plan was modified twice to clarify certain NIST authorities (54 FR 21331 of May 17, 1989, and 55 FR 39220 of September 25, 1990). The project plan and subsequent amendments were consolidated in the final APMS plan, which became permanent on October 21, 1997 (62 FR 54604). NIST published three subsequent amendments to the final APMS plan: one on May 6, 2005 (70 FR 23996), which became effective upon publication in the Federal Register; one on July 15, 2008 (73 FR 40500), which became effective on October 1, 2008; and one on July 21, 2009 (74 FR 35841), which became

effective upon publication in the Federal Register. NIST also published a correction on July 21, 2009 (74 FR 35843), which became effective upon publication in the Federal Register.

The final APMS plan, as amended, provides for modifications to be made as experience is gained, results are analyzed, and conclusions are reached on how the system is working. This notice formally modifies the APMS plan to (1) eliminate the mandatory minimum bonus for pay-capped employees receiving either a *Superior Contributor* or *Exceptional Contributor* rating of record, and (2) to solidify the three-year probationary period, a feature of the original demonstration project and subsequent Alternative Personnel Management System, for employees in the Scientific and Engineering career path hired into the Excepted and Competitive Service. Comments will be considered and any changes deemed necessary will be made.

Dated: June 13, 2012

David Robinson
Associate Director for Management Resources

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I. Executive Summary

The National Institute of Standards and Technology's (NIST) Alternative Personnel Management System (APMS) is designed to: (1) improve hiring and allow NIST to compete more effectively for high-quality researchers through direct hiring, selective use of higher-entry salaries, and selective use of recruiting allowances; (2) motivate and retain staff through higher pay potential, a pay-for-performance system, more responsive personnel systems, and selective use of retention allowances; (3) strengthen the manager's role in personnel management through delegation of personnel authorities; and (4) increase the efficiency of personnel systems through installation of a simpler and more flexible classification system based on pay banding through reduction of guidelines, steps, and paperwork in classification, hiring, and other personnel systems, and through automation (52 FR 37082, October 2, 1987). Since implementing the APMS, NIST is more competitive for talent, and NIST managers report significantly more authority to make decisions concerning employee pay.

This amendment seeks to better ensure fiscal responsibility and budget accountability within the pay-for-performance component of the APMS. It also seeks to ensure that management has the ability to adequately evaluate its scientific and engineering professional employees for research results, which may take longer than one year.

NIST's APMS performance rating system is a pay-for-performance system in which eligible employees may receive pay increases and bonuses based on performance. Pay increases

are based on an annually determined percentage of the mid-point salary for each pay band in a career path and linked directly to the top four performance ratings. One of the characteristics of the NIST APMS performance management system is a required bonus for high-performing employees who cannot receive a pay increase because they are at the top of their pay band. Specifically, salary-capped employees receiving a *Superior Contributor* or *Exceptional Contributor* rating must receive a bonus at least equivalent to the salary increase that they would have received if their salaries were not capped.

Another feature of NIST's APMS is an extended probationary period of up to three years for employees in the Scientific and Engineering career path (classified as "ZP"). The extended probationary period was an original component of the NIST Demonstration Project and later in the APMS. The purpose of the extended probationary period was to allow more time to assess scientific and engineering professionals because research results can often be difficult to evaluate in one year. Since the finalizing of the NIST APMS in 1997, the United States Court of Appeals for the Federal Circuit decided two cases, Van Wersch v. Department of Health & Human Services, 197 F.3d 1144 (Fed. Cir. 1999), and McCormick v. Department of the Air Force, 307 F.3d 1339 (Fed. Cir. 2002), which affected NIST's ability to fully utilize its extended probationary period.

This amendment modifies the APMS Plan, which was last amended in July 2009. Specifically, NIST will eliminate the mandatory minimum bonus for employees who are appraised at the top two rating levels, "Superior Contributor" and "Exceptional Contributor." It will also identify waiver language needed to retain the original system feature of an extended probationary period of up to three years for employees in the Scientific and Engineering career

path hired into the Excepted and Competitive Service. NIST will continually monitor the effectiveness of this amendment.

II. Basis for APMS Plan Modification

A. Performance Bonuses

The need to modify the current NIST APMS Pay for Performance System (PPS) surfaced in early 2011 after the implementation of a two-year pay freeze for Federal employees and the budget crisis that was resolved to narrowly avert a government shutdown. These actions reinforced the uncertainty of the budget for NIST, and, without additional funding for bonuses and pay increases, NIST realized that measures had to be taken to ensure fiscal responsibility in the application of its PPS.

Subsequently, in June 2011, the Office of Management and Budget (OMB) and the Office of Personnel Management (OPM) issued a memorandum titled “Guidance on Awards for Fiscal Years 2011 and 2012,”¹ implementing budgetary limits on monetary awards, which had a significant impact on NIST’s PPS. In response to these limitations, in August 2011, the Performance Management Board (PMB), responsible for governing and overseeing NIST’s APMS, decided to exercise its authority and approved an exception to normal procedures that suspended the mandatory minimum bonus for pay-capped employees who received Exceptional Contributor and Superior Contributor ratings in Fiscal Year 2011. As a result, all performance bonuses in FY11 were granted on a discretionary basis, subject to management controls to ensure that higher-rated employees in the same career path and pay band received commensurate bonuses.

In an effort to more closely align NIST’s APMS performance system with the Administration’s focus on fiscal responsibility and careful management of all resources, NIST is

¹ <http://www.chcoc.gov/transmittals/TransmittalDetails.aspx?TransmittalID=3997>

amending the provisions of the APMS to remove the requirement that a salary-capped employee with an Exceptional Contributor or Superior Contributor rating must receive a bonus at least equivalent to the salary increase that would have been received if the employee's salary were not capped.

B. Three-Year Probationary Period

Since its inception in 1987, NIST has had a provision, first in its OPM-approved Demonstration Project and later in its approved APMS, for an extended probationary period of up to three years for employees in the Scientific and Engineering career path (ZP). Appropriate waivers of laws, rules, and regulations were made at the time. Since then, the Federal Circuit issued two decisions (noted above) that affected NIST's ability to fully exercise the extended probationary period. This notice amends the APMS by identifying the appropriate waivers to permit NIST to apply an extended probationary period of up to three years to employees in the Scientific and Engineering career path.

III. Changes in the APMS Plan

The APMS at NIST, published in the Federal Register on October 21, 1997 (62 FR 54604), May 6, 2005 (70 FR 23996), July 15, 2008 (73 FR 40500), and July 21, 2009 (74 FR 35841 and 74 FR 35843), is amended as follows:

1. **Performance Bonuses:** The subsection titled "Performance Bonuses" (70 FR 23996, 23999, May 6, 2005) is deleted in its entirety and replaced with the following:

"Performance Bonuses

Bonuses are the only cash awards linked to the NIST APMS pay-for-performance system. They are awarded at the end of the performance rating period and may be granted

in conjunction with performance pay increases. A pay pool manager may award a bonus to any employee with a performance rating of Contributor or higher. A pay pool manager is a line manager who manages his or her organization's pay increase and bonus fund and has final decision authority over the performance ratings and bonuses of subordinate employees."

2. **Authorities and Waiver of Laws and Regulations Required:** The subsection titled "Authorities and Waiver of Laws and Regulations Required" (62 FR 54604, 54613, October 21, 1997) is deleted in its entirety and replaced with the following:

"Authorities and Waiver of Laws and Regulations Required

Public Law 99–574 gave the National Institute of Standards and Technology (NIST) the authority to experiment with several specific personnel system innovations which are otherwise prohibited by law and regulations. In addition to the authorities granted by the original NIST project legislation, the following waivers of law and regulation are included:

Title 5, U.S. Code

- Section 5304, Locality-based comparability payments.
- Section 5333, Minimum rate for new appointments.
- Section 5753–5754, except that relocation bonuses under section 5753 continue to apply.
- Subchapter VI of Chapter 53 Grade and Pay Retention, (To the extent necessary to allow the following modifications: (1) Pay retention does not apply to reductions in pay caused solely by geographic movement;

and (2) pay retention does not apply to conversions to the General Schedule as long as the employee's total rate of pay is not reduced).

- Section 7501(1) Adverse actions. (waiving the language "or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less;" waived only for positions in the Scientific and Engineering Career path).
- Section 7511(a)(1)(ii), 7511(a)(1)(B), 7511(a)(1)(C)(ii) Adverse actions (waived only for positions in the Scientific and Engineering Career path).
- Section 7512(4), Adverse actions, (To the extent necessary to allow the following modifications: (1) Exclude reductions in pay that are solely due to recomputation upon geographic movement; and (2) exclude conversions to the General Schedule that do not result in a reduction in the employee's total rate of pay).

Title 5, Code of Federal Regulations

- Sections 315.801 Probationary period; when required, (waived only for positions in the Scientific and Engineering Career path).
- Section 315.802 Length of probationary period, (waived only for positions in the Scientific and Engineering Career path).
- Section 315.803(b) Agency action during probationary period (general) (waived only for positions in the Scientific and Engineering Career path).

- Section 315.805 Termination of probationers for conditions arising before appointment (waived only for positions in the Scientific and Engineering Career path).
- Section 315.806 Appeal rights to the Merit Systems Protection Board (waived only for employees in the Scientific and Engineering Career path serving a probationary or trial period).
- Section 351.401 Determining Retention Standing.
- Section 351.402 Competitive area in RIF.
- Section 351.403 Competitive level in RIF.
- Section 351.504 (a) and (d) Credit for Performance.
- Section 351.701 Assignment involving displacement.
- Section 531.203 Minimum rate for new appointments.
- Part 575, Subpart A Recruitment Bonuses.
- Part 575, Subpart C Retention Allowances.
- Section 752.401(c)(2), 752.401(c)(3), 752.401(c)(5) Coverage (waived only for positions in the Scientific and Engineering Career path).

Department Administrative Orders

- 202-302 Employment in the Excepted Service (waived to the extent inconsistent with the APMS).
- 202-315 Probationary and Trial Periods (waived to the extent inconsistent with the APMS).”

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